88-595

Supreme Court, U.S.
FILED
AUG 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

COUNTY OF SUMMIT, *Petitioner*,

v.

CITY OF AKRON, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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August 23, 1988

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment's equal protection clause shields only the residents and not extraterritorial customers from a municipality's discriminatory water rates.

2. Whether a political subdivision has waived its Fourteenth Amendment equal protection rights against a municipally owned water utility by signing a written contract containing discriminatory water rates.

3. Whether a political subdivision may assert a Fourteenth Amendment equal protection claim against another political subdivision in state court.

[Note: Petitioner reserves the right to argue Questions 4 and 5 in the event certiorari is granted on any of the above questions but does not include Questions 4 and 5 among the reasons for grant of certiorari.]

4. Whether a municipaliy owned water utility which fails to appeal a state appellate court decision finding its rates discriminatory waives its right to challenge that judgment after submitting to a new trial at which no evidence is presented justifying the discrimination.

5. Whether a municipally owned water utility may consider the value of water service to a customer with no other source of supply in establishing a water rate.

LIST OF PARTIES

The parties to the proceedings below were the petitioner County of Summit and the respondent City of Akron. Fairway Manor, Inc. was a party to the original action in the trial court but received the relief it sought and has not participated in any of the subsequent appeals. Since none of the issues involved in this petition would have any effect on Fairway Manor, Inc., it has not been named as a party herein.

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COUNTY OF SUMMIT, *Petitioner*

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CITY OF AKRON, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner County of Summit respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in the above-entitled proceeding on April 13, 1988.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 36 Ohio St.3d 85, 521 N.E.2d 818 (Ohio 1988), and is reprinted in the appendix hereto, p. 1a, *infra*.

The second opinion of the court of appeals, the trial court's decision on remand and the original opinion of the trial court have not been reported. The first opinion of the court of appeals is reported at 13 Ohio App. 3d 233, 468 N.E. 2d 927 (Ohio App. 1983).

JURSIDICTION

Fairway Manor, Inc. filed suit in Ohio common pleas court on April 10, 1981 against both petitioner and respondent seeking water service to its real estate development. Petitioner filed a cross-claim against respondent alleging, among other things, unreasonable and discriminatory water rates, and respondent filed a cross-claim alleging breach of contract. Fairway Manor, Inc. received its water connection shortly after the suit was instituted and the matter proceeded to trial solely on the cross-claims. The trial court entered judgment in favor of respondent on all issues.

On petitioner's appeal, the state appellate court on December 23, 1983 reversed the trial court by finding that petitioner had presented a prima facie case of rate discrimination. *Fairway Manor, Inc.. v. City of Akron*, 13 Ohio App.3d 233, 468 N.E.2d 927 (Ohio App. 1983). Respondent did not appeal this decision. On remand, the trial court again entered judgment in favor of respondent.

Petitioner appealed and the state appellate court reversed the trial court for the second time on April 8, 1987 holding that respondent had failed to present evidence to justify the water rate discrimination. The appellate court remanded for further proceedings to enter relief for petitioner.

Respondent appealed to the Ohio Supreme Court and a motion to certify the record was granted September 2, 1987. The Ohio Supreme Court reversed the decision of the court of appeals and reinstated the trial court judgment in a decision dated April 13, 1988. See p.1a

infra. Petitioner filed a motion for rehearing on April 22, 1988 (p. 15a, *infra*) which was denied by the Ohio Supreme Court on May 25, 1988 (p. 14a, *infra*).

The jurisdiction of this Court to review the judgment of the Ohio Supreme Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is an Ohio county operating under a charter form of government and exercising municipal powers concurrently with other Ohio municipalities. In 1981, petitioner filed claims against the City of Akron, an Ohio municipality and respondent herein, to redress unjustified

water rate discrimination which deprived petitioner of its equal protection rights secured by the Fourteenth Amendment.

The discrimination involves charging petitioner 87 percent more for wholesale water than a similarly situated customer, the City of Tallmadge (hereinafter "Tallmadge"), despite the undisputed fact that the cost of serving both customers is the same. As a result, residents in two neighboring cities who are alike both economically and demographically pay vastly differing amounts for the identical product--water. Petitioner's viability as a retail water supplier and potential competitor of respondent has been seriously crippled.

Petitioner first entered into a wholesale agreement with respondent on May 16, 1972. The operation of a retail water system outside respondent's city limits was successful and petitioner was soon able to offer rates nearly as low as those offered by respondent inside Akron. Citing a need to raise wholesale rates to keep suburban rates high, respondent in 1977 gave petitioner the required two years notice for termination of the water contract.

Negotiations on a new contract continued for two years. Respondent advised petitioner that water service might cease or, if allowed to continue, would be provided at a cost higher than that being negotiated if a contract was not signed by the May 19, 1979 termination date. Petitioner approved a new water contract on May 19, 1979 which resulted in a rate increase of nearly 90 percent.

The new rate to petitioner equalled the rate charged to a customer within respondent's city limits plus a

surcharge of 105 percent. In contrast, the rate charged to respondent's only other wholesale customer, Tallmadge, represented a surcharge of only 10 percent. Respondent tried and failed to increase Tallmadge's rate but took no further action against the city. Consequently, petitioner asked for the renegotiation of its own rate. Respondent refused to negotiate a lower rate for petitioner and, to this date, continues to serve Tallmadge and petitioner at two very disparate rates.

At trial, respondent admitted that the water rates charged to petitioner and Tallmadge respectively were discriminatory (Additional Record AR 1-2; T.21-22). The water rate experts hired by both petitioner and respondent agreed that there were no engineering or other cost factors which justified the rate disparity (AR 3,4, 5-6; T.130, 208, 251-52). The cost of service studies of both experts agreed that petitioner was paying about double what it cost respondent to supply petitioner with water (Def. Ex. 13, 14).

The trial court, although recognizing the "manifest discrimination" caused by the rates, found that the substantial difference in rates was not illegal because Tallmadge had an alternative water supply and petitioner did not. In its decision, the court reasoned that the lack of an alternative water supply rendered the water more valuable to petitioner than Tallmadge and, thus, petitioner should pay a higher price.

Petitioner appealed from that decision citing, among other grounds, that the trial court erred in upholding a discriminatory rate which was based solely on the alleged value of service to petitioner. In a reported decision, the court of appeals reversed the trial court and held that "the County met its burden of going

forward with its evidence to demonstrate the rate differential between Tallmadge and the County is discriminatory on its face." *Fairway Manor, Inc. v. City of Akron*, 13 Ohio App.3d 233 at 237, 468 N.E.2d 927 at 932 (Ohio App. 1983). The case was remanded with instructions that the trial court should not consider the value of the service to petitioner in deciding whether the rate was unjustly discriminatory.

Respondent did not appeal from the appellate court's decision. On remand, respondent declined the trial court's offer of an evidentiary hearing. Instead, respondent simply submitted a brief which recited the same arguments presented during the first trial. Petitioner argued that respondent was required to present new evidence to rebut the evidence from the first trial which established that Tallmadge and petitioner were similarly situated and that there were no cost factors which justified the rate differential. Respondent presented no evidence regarding either issue.

The trial court, in its remand opinion, again held that the rate discrimination was justified. Petitioner appealed the decision of the trial court on the grounds that the trial court did not apply equal protection standards to the water rate discrimination and that respondent had not met its burden of presenting evidence to rebut petitioner's showing of unjust discrimination.

For the second time, the court of appeals reversed the trial court and held that respondent had failed to present any evidence of greater expense or difficulties in serving petitioner which would justify a higher rate than that charged to Tallmadge. The court, citing 12 McQuillan, *The Law Of Municipal Corporations*, 285-87, Section 34.101 (3rd ed. 1986), held that discrimination

may not be based on the value of the service to the customer. It sustained petitioner's assignments of error, reversed the trial court judgment, and remanded the case for further proceedings on the relief sought by petitioner. Respondent appealed this judgment to the Ohio Supreme Court.

The Ohio Supreme Court reversed the court of appeals decision and stated that a municipality is prohibited only from discriminating against its own residents. The court went further and declared that discrimination in rates may be based on the value of service to the customer.

A timely motion for rehearing (p. 15a, *infra*) was filed by petitioner seeking to have the Ohio Supreme Court address its equal protection claims under the United States and Ohio constitutions. Petitioner had presented written federal and state equal protection arguments in its trial brief to the common pleas court, first appeal of the trial court decision (see assignment of error #1), brief on remand to the trial court, appeal of the remand decision (assignment of error #3), and the brief to the Ohio Supreme Court.

Petitioner pointed out that the court's opinion failed to apply equal protection standards to the admitted discrimination practiced by respondent even though both petitioner and respondent agreed upon the standard applicable to the case. The opinion's author cited no state or federal equal protection cases despite the fact that he had written two other majority opinions in the prior six months in which equal protection under both the United States and Ohio constitutions had been extensively discussed. *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 514 N.E.2d 709 (Ohio 1987); *Lyle*

Construction, Inc. v. Division of Reclamation, 34 Ohio St.3d 22, 516 N.E.2d 209 (Ohio 1987).

Instead, the court's authorization of discrimination outside the city limits and implied waiver of constitutional rights were issues which were neither briefed nor argued by either party. To add to the confusion, no case law was cited by the court to justify these revisions to established state and federal equal protection case law.

The Ohio Supreme Court denied petitioner's motion for rehearing on May 25, 1988.

REASONS FOR GRANTING THE WRIT

I.

The Ohio Supreme Court's limitation of Fourteenth Amendment equal protection to a municipal water supplier's city limits conflicts with decisions of this Court and other state supreme courts.

The Ohio Supreme Court has rewritten constitutional law by deciding that the Fourteenth Amendment's Equal Protection Clause does not apply to a municipal utility's actions outside the city limits. By so doing, the state court has removed the only protection many customers have against the unfair practices of a monopolistic supplier of an essential commodity. Such a wholesale elimination of federal rights deserves this Court's review.

The first sentence in the decision below reiterates that, in Ohio, "[a] municipally owned public utility is exempt from restriction or regulation by the General

Assembly" (p. 4a, *infra*). In the second sentence, the opinion limits court control over such utilities "to protecting *residents of the municipality* from the imposition of rates which are unreasonable or which discriminate among such residents" (p. 4a, *infra*; emphasis in original). There was neither discussion of petitioner's federal equal protection claim nor a review of federal case law.

The state court's limitation of Fourteenth Amendment equal protection conflicts with this Court's ruling against respondent sixty-two years ago in *Cuyahoga River Power Company v. City of Akron*, 240 U.S. 462 (1916). That case involved respondent's construction of a dam outside its city limits and its intention to take property and water rights from a hydroelectric power company. The Court reversed the district court's dismissal after finding that the alleged actions of Akron outside its city boundaries constituted state action subject to the restrictions of the Fourteenth Amendment. The finding of state action beyond respondent's borders in *Cuyahoga River Power Company* precludes the state court from now creating arbitrary discrimination zones outside the City of Akron.

The instant case is also in conflict with *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985). In that case, Alabama enacted a lower tax rate on domestic insurance companies than out-of-state insurance companies. As a preliminary matter, the Court stated that it "always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation'" 470 U.S. at 878. If a State may not enact legislation which discriminates

against nonresidents, then presumably a municipality is similarly barred within its own state.

The Ohio Supreme Court's redefinition of the Equal Protection Clause also conflicts with decisions in other States. In Texas, the supreme court has held that the "limits of a municipal corporation, of themselves, do not furnish a reasonable basis for rate differentiation." *City of Texarkana v. Wiggins*, 246 S.W.2d 622 at 626 (Texas 1952). The court made a further statement clearly applicable to the instant case:

> The petitioner makes no contention that it could exact of one nonresident one and one-half times the rate charged another nonresident nor does it contend that it could thus discriminate between its residents. Indeed, it seems very clear that, even reading the statute as petitioner would have us read it, this could not be done.
> 246 S.W.2d at 626.

California has applied federal equal protection standards in determining whether a surcharge imposed by a city on nonresident water customers is justified.

> When social or economic regulations are involved, the rational-basis test applies. In such cases, "'statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'" (*Dandridge v. Williams* (1970) 397 U.S. 471, 485 (quoting *McGowan v. Maryland* (1961) 366 U.S. 420, 426).) The reasonableness test applied to municipal utility rates is somewhat more stringent than the bare rational basis test.
> *Hansen v. City of San Buenaventura*, 729 P.2d 186 at 197 (Cal. 1986).

The Alabama Supreme Court has adopted a similar rational-basis test for nonresident water rates. *Water Works Bd. of Birmingham v. Barnes*, 448 So.2d 296 (Ala. 1983).

The Ohio Supreme Court did not provide any reason for denying equal protection outside respondent's boundaries. Thus, it is not clear if the holding is limited only to municipal utilities or if it applies to other municipal functions as well. Confusion is likely to develop whenever a nonresident raises federal rights against a municipality in state court. Since, as will be discussed later, petitioner is unable to redress this matter in federal court per the decision in *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986), review of the state court decision by this Court is essential.

II.

The Ohio Supreme Court's holding that equal protection rights may be waived by a political subdivision in a written agreement with a municipal water supplier absent express language to that effect conflicts with decisions of this Court.

The state court held that where water rates "are set forth in a contract, such rates will not be struck down as discriminatory even where no factor exists which could justify the rate discrimination" (p. 1a, *infra*, syllabus #2). The clear implication of such a holding is that a water customer waives all federal equal protection rights by signing a written contract with a municipal water utility. No citations or explanation for the loss of Fourteenth Amendment protection accompanied the holding.

The Ohio Supreme Court's creation of an unqualified, involuntary waiver of federal equal protection rights conflicts with this Court's holding in *Brookhart v. Janis*, 384 U.S. 1 (1966). In that case, this Court reversed the Ohio Supreme Court's denial of a criminal defendant's right to cross-examine witnesses who testified against him and stated:

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, see e.g., *Glasser v. United States*, 315 U.S. 60, 70-71, and for a waiver to be effective, it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464.
> 384 U.S. 1 at 4.

The agreement between petitioner and respondent did not contain any explicit or intentional abandonment of Fourteenth Amendment equal protection.

The state court's failure to find a withdrawal of the alleged waiver is similarly in conflict with *Stevens v. Marks*, 383 U.S. 234 (1966) which held:

> Even were we to assume, without deciding, that a State may constitutionally exact, on pain of loss of employment and in the absence of counsel, the waiver of a constitutional right, we would be unable to find any jus' fication for denying the right to withdraw it.
> 383 U.S. 234 at 243-244.

Even if a waiver resulted from the signing of a water contract, petitioner withdrew it when it asked to renegotiate its rate in 1980, one year after signing the agreement. The renegotiation was sought because respondent had not increased the wholesale rate to Tallmadge. Every action taken by petitioner from that point through the filing of an action alleging illegal discrimination evinced a withdrawal of any waiver and the intent to assert constitutional rights. The request for termination of the water agreement in petitioner's prayer for relief is unequivocal proof that a waiver, if effective, was withdrawn.

The decision below also conflicts with *Shelley v. Kraemer*, 334 U.S. 1 (1948) with respect to the issue of a federal rights waiver in a written agreement. That case involved an attempt to enforce racially restrictive covenants on property. The Court found that the Fourteenth Amendment was not "ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement." 334 U.S. 1 at 20.

The Ohio Supreme Court has redefined federal equal protection by: (1) permitting an involuntary waiver of federal equal protection rights; (2) refusing to acknowledge overt action indicating a withdrawal of any such waiver; and (3) refusing to apply constitutional restrictions to conduct performed pursuant to a written agreement. The state court's wide-ranging decision on important constitutional issues conflicts with established federal case law and should be reviewed by this Court.

III.

The Ohio Supreme Court's refusal to consider the federal equal protection claim raised by a political subdivision against a municipal water supplier raises an unresolved issue concerning the breadth of Fourteenth Amendment protection.

The Ohio Supreme Court applied common law remedies to the rate discrimination practiced by respondent. Its refusal to consider petitioner's constitutional arguments stemmed from its decision ten weeks earlier in *Avon Lake City School Dist. v. Limbach*, 35 Ohio St. 3d 118, 518 N.E. 2d 1190 (Ohio 1988). The *Avon Lake* decision held that a political subdivision could not assert Fourteenth Amendment rights against the State. In the instant case, the Ohio Supreme Court has extended that prohibition to actions by one political subdivision against another.

This raises the important question of whether a political subdivision possesses Fourteenth Amendment rights. The Sixth Circuit has ruled that political subdivisions may not raise such rights against other political subdivisions in federal court. *South Macomb Disposal v. Township of Washington*, 790 F. 2d 500 (6th Cir. 1986).

> Therefore, the Fourteenth Amendment simply does not prescribe guidelines and impose restrictions upon one political subdivision vis-a-vis another political subdivision. The relationship between the entities is a matter of state concern; the Fourteenth Amendment protections and limitations do not apply.
> 790 F.2d 500 at 505.

The *South Macomb* decision is in conflict with the Second Circuit's decision in *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2nd Cir. 1984). In that case, the court held that a municipal corporation could raise Fourteenth Amendment rights against parties other than its creator State in federal court:

> Appellees urge that because the township is a political subdivision of the state it cannot assert rights under the due process clause, citing several cases from the Supreme Court and one from this court. None of these cases is in point. In each of them, a municipality was challenging a law of its own state.
>
> . . .
>
> We hold that a municipal corporation like any other corporation is a 'person' within the meaning of the fourteenth amendment and is entitled to its protection.
>
> 403 F.2d 684 at 686.

The Ohio Supreme Court relied upon *South Macomb*, *supra* to deny constitutional rights to school districts in *Avon Lake*, *supra*. It has now refused, in the *Fairway Manor* case, to consider the equal protection claims between political subdivisions presumably upon the authority of *South Macomb*. These decisions preclude petitioner from raising Fourteenth Amendment claims in federal or state courts and call into question whether petitioner does indeed possess such rights.

The federal courts as well as the Ohio Supreme Court need this Court to determine whether political subdivisions have federal equal protection rights. If they do, guidance is needed as to the nature of the parties against whom such rights may be asserted and the courts in which they may be raised. This issue is of

great importance to every political subdivision in the nation.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted. Petitioner reiterates that questions 4 and 5 are not presented as a reason for granting certiorari but because this is the only opportunity for petitioner to seek review of the Ohio Supreme Court's decision that respondent's rate discrimination is justified. If petitioner is correct in stating that it is entitled to Fourteenth Amendment equal protection against petitioner's unjustified discrimination, the matter should be remanded to the Ohio common pleas court for a determination of damages.

Respectfully submitted,

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APPENDIX

DECISION OF THE SUPREME COURT OF OHIO

FAIRWAY MANOR, INC. v. BOARD OF COMMISSIONERS OF SUMMIT COUNTY; CITY OF AKRON, APPELLANT; COUNTY OF SUMMIT, APPELLEE.

[Cite as Fairway Manor, Inc. v. Bd. of Commrs. of Summit Cty. (1988), 36 Ohio St. 3d 85.]

Municipal corporations-Municipally owned public utilities-No duty to sell utility's product to extraterritorial purchasers absent contractual obligation-Rates for water set forth in contract will not be stricken as discriminatory, when.

1. Municipally owned public utilities have no duty to sell their products, including water, to extraterritorial purchasers absent a contractual obligation.

2. Where rates for water from a municipally owned public utility are set forth in a contract, such rates will not be struck down as discriminatory even where no factor exists which could justify the rate discrimination.

(No. 87-952-Decided April 13, 1988.)

APPEAL from the Court of Appeals for Summit County.

Plaintiff, Fairway Manor, Inc., filed a complaint on April 10, 1981 against appellant, the city of Akron, and

the Board of Commissioners of Summit County. The complaint sought an order requiring the governmental parties to supply water to plaintiff's condominium project.

Appellant subsequently filed a third-party complaint[1] against appellee, Summit County, and others, stemming from a 1979 contract under which appellant had agreed to supply water to appellee at a fixed rate. Appellant alleged that appellee breached the contract by refusing to make payment in accordance with the terms of the agreement. Appellant prayed for damages and rescission of the contract.

Appellee answered and counterclaimed, admitting that payment had been withheld, but alleging, *inter alia*, that the contract was entered into under duress and that it contained unreasonable and discriminatory water rates. Appellee's allegation was based on the fact that the city of Tallmadge, which also purchases its water in bulk from appellant, paid the Akron rate plus ten percent, while appellee paid the Akron rate plus as much as one hundred five percent.[2]

Fairway Manor obtained the relief it sought by court order issued April 14, 1983. The case proceeded to trial on appellant's third-party complaint and appellee's counterclaim. The trial court found that the rates charged by appellant to appellee for water were not unreasonable, and that the contract was not entered into under duress. The court further found that neither party had sustained its burden of proof on the respective claims. Appellant had not proven that appellee had breached the contract, and appellee had failed to show illegal discrimination in the water rates charged by appellant. In concluding that no such discrimination had been established, the court reasoned that the markedly

higher rate charged to appellee was justified by the value of the contract to appellee, in that appellee had no alternative water source and the contract provided a stable supply for an extended number of years. The court refused to rescind the contract, and no damages were awarded to either party. In effect, the parties were left in the same position in which they were found, except that appellee was ordered to release to appellant the quarterly payment, with its accrued interest, which appellee had, to protest the water rates, placed in escrow.

Upon appeal, the court of appeals reversed and remanded, holding that the trial court erred in considering the inability of appellee to obtain water elsewhere as a factor in its analysis of whether the rate charged by appellant was discriminatory. The appellate court remanded the cause for a determination of whether the difference between the rate charged to Tallmadge and the rate charged to appellee is unjustly discriminatory. The trial court, in making this determination, was instructed not to consider appellee's lack of an alternative water source.[3]

On remand, no further evidentiary hearing was held. The parties submitted their arguments to the court based on the evidence previously adduced. In again concluding that the rate in question was not discriminatory, the court found that the difference in rates was justified by the difference in status between appellee and the city of Tallmadge. By virtue of its superior status as a party with a definitive written contract, appellee enjoyed the benefits of stability which Tallmadge, having no long-term contract with appellant, did not possess. These benefits included a long-term fixed rate schedule and the ability to plan water operations for years in

advance. Thus, the rates, though different, were not discriminatory.

Appellee appealed to the court of appeals, which again reversed the judgment of the trial court. The appellate court held that the benefits received by appellee as a result of the water contract cannot alone justify a discrimination in rates. The court emphasized the lack of any evidence in the record tending to show that appellant encounters "additional expense or difficulty attributable to the benefits that it provides to * * * [appellee]."

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Max Rothal, director of law, and *Pamela A. Walker, Thompson, Hine & Flory, Leslie W. Jacobs* and *James B. Niehaus*, for appellant.

Vorys, Sater, Seymour & Pease, Duke W. Thomas and *Scott M. Doran*, for appellee.

DOUGLAS, J. A municipally owned public utility is exempt from restriction or regulation by the General Assembly. Section 4, Article XVIII, Ohio Constitution; *Swank v. Shiloh* (1957), 166 Ohio St. 415, 2 O.O.2d 401, 143 N.E. 2d 586, paragraph one of the syllabus. The degree of control which the courts will exert over such public utilities is strictly limited to protecting *residents of the municipality* from the imposition of rates which are unreasonable or which discriminate among such residents, taking into account their situation and classification. *State, ex rel. Mt. Sinai Hosp., v. Hickey* (1940), 137 Ohio St. 474, 477, 19 O.O. 159, 161, 30 N.E. 2d 802, 804.[4] The question presented by the instant

cause is: To what extent will a court review the rates charged by a municipally owned public utility to an extraterritorial purchaser when those rates are contained in a contract negotiated between the parties?

Appellee and the court of appeals both rely on *Western Reserve Steel Co. v. Cuyahoga Heights* (1928), 118 Ohio St. 544, 161 N.E. 920, for the proposition that a rule against discrimination applies to rates fixed by contract. In so construing *Western Reserve*, a major distinguishing feature is overlooked. In that case, the village of Cuyahoga Heights, which purchased its water from the city of Cleveland, unjustly discriminated against one of its own resident consumers. This court held that "[i]t is the duty of a municipality which undertakes to supply water *to its public* to do so without discrimination. * * * The municipality cannot absolve itself of such duty by a contract to which the person sought to be discriminated against and to whom it owes the duty is not a party." (Emphasis added.) *Id.* at paragraph one of the syllabus.

By contrast, the case before us does not involve the duty of a municipality to its own public. The dispute herein is between two separate and distinct governmental entities, a municipality and a county. No question is presented of a municipality's duty to its own residents. Therefore, *Western Reserve* is inapposite.

Courts must presume that the language of a contract between competent persons accurately reflects the intentions of the parties. *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E. 2d 411, paragraph one of the syllabus. The purpose of this presumption is to protect a right considered basic in our society: the right to freely contract. A necessary means

of preserving this right is the long-standing tradition of judicial reluctance to reform or rescind a contract absent a compelling reason to do so.

In support of its contention that the rate in question is discriminatory, appellee emphasizes two points: the difference between the rates charged to the city of Tallmadge and those charged to appellee, which are both wholesale bulk water purchasers, and the absence of any additional expense or difficulty encountered by appellant in supplying water to appellee as compared to Tallmadge. Thus, appellee contends, Tallmadge and appellee are similarly situated customers charged different rates for no logical or equitable reason. Therefore, the difference in rates constitutes impermissible discrimination. We cannot agree.

Where water rates are set forth in a contract, the fact that the rates contained therein are higher than those charged to similarly situated customers in the same class does not constitute a basis for judicial reformation of the contract. In such cases, it will be presumed that the higher rates were arrived at through the normal give and take of contractual negotiation. The lack of any cost differential to the seller does not affect the validity of the contractual rate. Even where no factor exists which would justify a difference in the rate charged, the court must leave the parties with their bargain.

If appellee is dissatisfied with the rates charged by appellant, appellee must be reminded that it entered the bargaining process freely and without duress. The trial court specifically found that appellee brought to the bargaining table persons who were qualified to exercise informed judgment in the negotiation of this particular contract.

Given these facts, this court will not interpose its judgment by rescinding or even reforming the contract. This position stems primarily not only from the belief that the parties should live with their bargain, but also from the realization that no other course of action is reasonably practicable. Our review of the possible alternative approaches to this case has compelled us to conclude that those approaches are completely unworkable, as will be seen from the following discussion.

Appellee's proposed solution, affirmance of the judgment of the court of appeals, is unacceptable. We cannot endorse the holding of the appellate court that discrimination in rates may not be based on the value of the service to the customer. The customer's desire and need for the product is always a factor in determining price. There is nothing inherently unfair in permitting this factor to be utilized in the negotiation process. Nor do we agree with the reasoning of the appellate court that the difference in rates may be justified only by a difference in the cost of supplying the service. Many other factors may justify a difference in rates. But where a particular rate is fixed by contract, it is for the parties, not the courts, to determine the rate to be charged. In such matters, courts will presume the wisdom of the bargain and uphold the contract.

An order remanding this cause, yet again, to the trial court would certainly serve no useful purpose. The trial court has already found that the contract in question was entered into freely and without duress. No other evidence could conceivably be relevant.

But the real dilemma presented by the court of appeals' disposition of this cause is its practical implications. By reversing the trial court's order upholding the contract, the appellate court necessarily struck down the contract, or at least that part of the contract which set forth water rates. Included in the judgment of the court of appeals was an order remanding the cause to the trial court "for further proceedings according to law on the other relief sought by * * * [appellee]." A question arises as to the course of action the trial court is expected to take in the face of such an order. Obviously, the court of appeals meant that the trial court should enter judgment for appellee and proceed to consider what relief is appropriate.

If the trial court enters judgment for appellee, then what relief is available? Appellee prayed that the "written agreement of May 19, 1979, be ordered cancelled and rescinded, that the Court grant a preliminary and permanent injunction enjoining * * * [appellant] from terminating water service to * * * [appellee], and that the Court order the parties to abide by the terms of the [previous] May, 1972, water agreement until such time as a reasonable, nondiscriminatory contract is negotiated by the parties in accordance with the final order of the Court and for any further relief the Court deems necessary and proper."

Basically, appellee is asking that appellant be ordered to supply water to appellee under the terms set forth in the 1972 contract until a new, acceptable contract (*i.e.*, acceptable to appellee) can be executed. The end result would be that appellant will be forced to supply water to appellee on terms other than those bargained for by the parties. This result cannot be countenanced.

Municipally owned public utilities have no duty to sell their products, including water, to extraterritorial purchasers absent a contractual obligation. *State, ex rel. Indian Hill Acres, Inc., v. Kellogg* (1948), 149 Ohio St. 461, 37 O.O. 137, 79 N.E.2d 319, paragraph three of the syllabus. Even where there is a contract, but the contract provides no termination date, either party to the agreement may terminate it upon reasonable notice. *Grandview Heights v. Columbus* (1963), 174 Ohio St. 473, 23 O.O. 2d 117, 190 N.E. 2d 453, paragraph two of the syllabus. Thus, it can be seen that a municipality does not assume a duty to continue supplying water in perpetuity to extraterritorial customers merely by virtue of having once agreed to supply it. This court has further held that the General Assembly is without power to require a municipality to furnish water to noninhabitants or to limit the price the municipality may charge for such service. *State, ex rel, McCann, v. Defiance* (1958), 167 Ohio St. 313, 4 O.O. 2d 369, 148 N.E. 2d 221, paragraph two of the syllabus. The municipality has the sole authority to decide whether to sell its water to extraterritorial purchasers. *Indian Hill Acres, supra*, paragraph two of the syllabus.

By granting appellee's prayer for relief, the trial court would be terminating the 1979 contract and forcing appellant to sell under the terms of the 1972 contract. This it cannot do. By terminating the 1979 contract, the court would absolve appellant of all duties thereunder, including the duty to supply water to appellee. Appellee cannot then request that appellant's duty to supply water be resurrected by compelling appellant to perform under the 1972 contract. In essence, this would be requiring appellant to sell water to appellee, and at a price dictated by appellee.

The remaining alternative remedies are equally unworkable. For example, if the trial court were to preserve the 1979 contract but strike down the rates contained therein as discriminatory, then what is the result? New rates would have to be determined. This poses yet another dilemma: Who sets the new rates? The court itself is not in a position to decide an appropriate rate. " * * * [A] court may not engage in rate-making since this is a legislative function." 12 McQuillin, Municipal Corporations (3 Ed. Rev. 1986) 616, Section 35.37a. Even if a court were to undertake to set the rates for these parties, it has not been explained how that is to be accomplished. Appellee repeatedly points to the Tallmadge rate in an attempt to highlight the alleged unfairness of its own rate. Should the trial court therefore order that the Tallmadge rate be paid by appellee, or that appellee's rate be paid by Tallmadge? Or does the court resort to a "compromise verdict" by setting the rate somewhere in the middle? These alternatives are obviously untenable. If the 1972 rates are forced on appellant, appellant would be compelled to continue to supply water at rates to which it has not agreed, thereby stripping appellant of all its discretionary authority over its own water supply. This court has previously refused to compel a municipality to continue to supply water to non-residents under the terms of an expired contract, on the basis that the council of the municipality has the sole authority to decide whether it would continue to furnish its surplus water to surrounding territories. *Indian Hill Acres, supra.*

Ordering the parties to renegotiate is certainly not a realistic alternative. Again, the problem arises of compelling appellant to continue supplying water under terms other than those to which it had agreed. Other problems inevitably present themselves. What rate

prevails while the contract is being negotiated? How can the parties be *forced* to come to a meeting of the minds?

It can readily be seen from the foregoing that judicial interference in these kinds of contract disputes creates many more problems than it solves. The only sensible, practical and logical solution is simply to leave the parties with their bargain. It is neither harsh nor unfair to require appellee to abide by the terms of the agreement for which it bargained. Appellee cannot be relieved of its obligations under this contract merely because it now believes that the bargain it made was a bad one.

Moreover, we are mindful of the extreme ramifications which would follow from an order requiring appellant not only to continue to sell its surplus water to appellee, but at a price to which appellant has not agreed. Such an outcome would cast uncertainty on every similar contract throughout the state where the supplier charges a higher rate to extraterritorial purchasers, or differing rates to non-residents in different contracting districts. We are unwilling to take such a step.

Accordingly, we hold that where rates for water from a municipally owned public utility are set forth in a contract, such rates will not be struck down as discriminatory even where no factor exists which could justify the rate discrimination. Therefore, evidence that the water supplier encounters no additional cost or difficulty in selling the water to the party challenging the rates has no bearing on the validity of those rates.

In conclusion, based on the foregoing, the judgment of the court of appeals is reversed and the judgment of the trial court is reinstated.

Judgment reversed.

MOYER, C.J., SWEENEY, WRIGHT, and YOUNG, J.J., concur.

LOCHER and HOLMES, JJ., concur in judgment only.

YOUNG, J., of the Tenth Appellate District, sitting for H. BROWN, J.

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[1] Appellant denominated this pleading as a third-party complaint. However, with respect to appellee, the pleading would more properly be designated a cross-claim, since appellee was a co-party defendant with appellant in the original complaint. See Civ. R. 13(G) and 14(A).

[2] Although, in its brief to this court, appellee cites the figure of one hundred five percent as the highest effective charge under the contract, an exhibit filed by appellee in the trial court reflects an outside figure of one hundred fourteen percent. The exhibit also reflects effective rates of less than one hundred five percent.

[3] This opinion is reported at (1983), 13 Ohio App. 3d 233, 13 OBR 285, 468 N.E. 2d 927.

[4] We are aware that this rule is set forth in somewhat broader language in the decision cited as authority therefor. Specifically, the court stated that "[t]he only general restraints imposed on the distribution of water are that the rates charged be reasonable and that there be no unjust discrimination among the customers taking into account their situations and classification." *State, ex rel. Mt. Sinai Hosp., v. Hickey*

(1940), 137 Ohio St. 474, 477, 19 O.O.159, 161, 30 N.E. 2d 802, 804. However, it is clear from the context of the case that this rule was restricted to a municipality's distribution of water among its own residents. The ordinances under review in *Mt. Sinai* were concerned solely with water distribution within the territorial limits of the municipality in question. We believe the above-quoted rule must be interpreted within the context of the facts of that case.

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

This cause, here on appeal from the Court of Appeals for Summit County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed and judgment of the trial court is reinstated consistent with the opinion rendered herein.

It is further ordered that the appellant recover from the appellee its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Summit County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

/s/ THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 13th day of April, 1988.

MARCIA J. MENGEL, CLERK
/s/ Rita A. Jackson, DEPUTY

REHEARING ENTRY OF THE SUPREME COURT OF OHIO

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

/s/ THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 25th day of May, 1988.

MARCIA J. MENGEL, CLERK
/s/ Rita A. Jackson, DEPUTY

MOTION FOR REHEARING

(Filed April 22, 1988)

MOTION

The Appellee, County of Summit, respectfully moves for a rehearing of this cause pursuant to Rule IX of the Rules of Practice of the Supreme Court of Ohio so that the reversal of the judgment of the court of appeals may be vacated and set aside for the following reasons.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Paragraph 2 of the syllabus in this Court's decision in *Fairway Manor, Inc. v. Board of Commissioners of Summit County* (1988), 36 Ohio St. 3d 123 (decided April 13, 1988), states:

> Where rates for water from a municipally owned public utility are set forth in a contract, such rates will not be struck down as discriminatory even where no factor exists which could justify the rate discrimination.

This holding is correct to the extent that federal and state equal protection claims are not raised by the party claiming discrimination and are not treated by the lower courts. In the *Fairway Manor* case, however, appellee argued its constitutional rights under the United States and Ohio constitutions in the trial and appellate courts and, thus, has not waived its right to present equal protection arguments before this Court.

The written federal and state equal protection arguments were presented in appellee's trial brief to the common pleas court, in its first appeal of the trial court decision (assignment of error #1), in its brief on remand to the trial court and in its appeal of the remand decision (assignment of error #3). The reason for not specifically reciting to the Court the long list of cases which define permissible and prohibited discrimination is that appellee was satisfied with the application of equal protection standards by the court of appeals. Since appellant did not raise the issue in its brief, it apparently accepted the appellate court's equal protection criteria and was simply arguing whether or not the facts of the case supported the conclusion that its discrimination was prohibited. Under these circumstances, it was sufficient to cite only those cases in which this Court has ruled that unjustified discrimination in municipal rates is unlawful.

It seems beyond question that equal protection was overlooked by the Court in the *Fairway Manor* decision.

The author of the opinion has in the past six months written two other majority opinions in which equal protection under both the United States and Ohio constitutions has been extensively discussed. *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St. 3d 54, *Lyle Construction, Inc. v. Division of Reclamation* (1987), 34 Ohio St. 3d 22.

In both cases, the Court applied the rational basis test to determine if the classification which produced the disputed discrimination furthered a legitimate legislative objective. This standard is grossly at odds with the result in the instant case which upheld discrimination even where no factors could be produced to justify it. Clearly, the Court was not treating appellee's claim as one governed by the equal protection requirements of the United States and Ohio constitutions.

It goes without saying that the issue in the present case is subject to federal and state equal protection. The U.S. Supreme Court has specifically held that a federal question exists in appellant's actions outside its territorial boundaries. *Cuyahoga River Power Company v. City of Akron* (1916), 240 U.S. 462. In that case, the City of Akron passed an ordinance to appropriate water rights and build a dam which would have damaged plaintiff's ability to generate hydroelectric power. Justice Holmes, writing for the Court, held that appellant's acts were to be regarded as state action which was subject to the 14th Amendment to the United States Constitution.

The Ohio Constitution provides no less protection.

Both the Constitution of the United States (Fourteenth Amendment) and the Constitution of Ohio (Section 2, Article I) provide for "equal protection."

> Simply calling a group of persons selected for special legislative treatment a class does not satisfy the requirements of equal protection. However, the foregoing constitutional provisions do not prohibit all class legislation. They do require that such legislation must apply alike to all persons within a class, and reasonable grounds must exist for making a distinction between those within and those without a designated class.
> *Porter v. Oberlin* (1965), 1 Ohio St. 2d 143 at 151-152

Had the Court been aware of appellee's equal protection claims, it would have applied the tests to determine if the water rate discrimination was justified. Further, appellee believes that the Court would not have made a distinction that appellant was serving a customer outside its city limits or that a written contract existed since neither the United States nor Ohio constitutions waive equal protection requirements in such cases.

A rehearing is necessary to allow the Court to consider the constitutional aspects of this case which appellee has argued beginning with the trial court and which were applied by the court of appeals. Without a rehearing, this case will stand for the proposition that equal protection does not apply to municipalities supplying water outside their borders. To appellee's knowledge, such a holding would be unique to the fifty states and would certainly be in conflict with the U.S. Supreme Court's decision in *Cuyahoga River Power Company v. City of Akron* (1916), 240 U.S. 462.

If a rehearing is granted, appellee would also like to point out several factual mistakes in the Court's decision. The opinion states that *Western Reserve Steel Co. v. Cuyahoga Heights* (1928), 118 Ohio St. 544 only

prohibited discrimination against a city's own residents. In contrast, the language of *Western Reserve* specifically binds the City of Cleveland to serve the Village of Cuyahoga Heights without discrimination.

> When the city of Cleveland, under the power conferred upon it by the Constitution, entered into a contract to deliver water to the village of Cuyahoga Heights and its public, its status with reference to the public of the village differed from the status of a private corporation obtaining a franchise from a village to perform the same service only in the fact that a municipality, in such situation, has not been declared by statute to be a public utility and probably is not subject to regulation and supervision by the Public Utilities Commission of Ohio. Any provision in its contract with the village which would be void or voidable because of its being unlawful or unreasonably discriminatory if contained in the franchise of a private corporation will be void or voidable as to the public of the village.
> 118 Ohio St. 544 at 550

This holding is further reinforced by the first sentence of paragraph three of the syllabus in *State ex rel. Indian Hill Acres, v. Kellogg* (1948), 149 Ohio St. 461 which states:

> In the sale and delivery of surplus products of a municipal utility to others than the municipality and its inhabitants, the municipality is authorized to bind itself by a contract whereby it dedicates itself to the public served and assumes the duty to supply such product without discrimination.
> 149 Ohio St. 461.

The Court should review whether its intent in the present case was to overrule the decisions in *Western Reserve*, *supra* and *Indian Hills*, *supra* cases.

The opinion also mistakenly states that appellee's prayer for relief would require this Court to terminate the 1979 agreement and reinstitute the 1972 agreement. A review of appellee's counterclaim against the appellant will reveal that the described relief was requested only in the cause of action alleging duress. That claim is not before this Court. The cause of action which sets for appellee's equal protection claim requests damages and an injunction against "any and all future discriminatory and unreasonable rate increases." This measure of relief is not beyond the Court's scope to award.

In conclusion, a rehearing is necessary to resolve the constitutional issues surrounding appellee's claim. It is clear that the opinion in the present case neither applied the applicable equal protection standard to the water rate discrimination nor cited any reason why constitutional protection would not be afforded to appellee. In light of the U.S. Supreme Court decision which holds that such protection is available and the confusion which may result if prior inconsistent decisions of this Court are not overruled, a further review is warranted.

Respectfully submitted,

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Attorneys for Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Rehearing was placed in the U.S. Mail this 22nd day of April, 1988 addressed to: Leslie W. Jacobs and James B. Neihaus, Thompson, Hine and Flory, 1100 National City Bank Bldg., Cleveland, OH 44114 and Harold K. Stubbs and Pamela A. Walker, City of Akron, 161 South High Street, Suite 202, Akron, OH 44308, Attorneys for Appellant.

/s/ Kerry Bruce
Attorney for Appellee